

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Market Disputes Resolution Division
445 12th St., SW
Washington, DC 20554

Via Email and U.S. Mail

August 31, 2017

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Re: *Level 3 Communications, LLC v. AT&T Inc., Proceeding No. 17-227,*
Bureau ID No. EB-17-MD-003

Counsel,

On August 25, 2017, Level 3 Communications, LLC (Level 3) and AT&T Inc. (AT&T) requested Commission action with respect to several matters relating to Level 3's anticipated filing of a formal complaint in the above-referenced proceeding.¹ This letter ruling adopts, with minor modifications and clarifications, the proposals contained in the Joint Letter regarding the waiver of certain procedural rules, a schedule for the submission of pleadings, and the entry of a Protective Order establishing procedures for the use and disclosure of proprietary information.

Waiver of Procedural Rules

Having reviewed the Joint Letter's request for waiver of certain procedural rules,² we hereby grant the parties' request to waive the portions of Commission rules 1.721(a)(6), 1.724(c), and 1.726(c)

¹ Letter from Thomas Jones, Counsel for Level 3 Communications, LLC, and Christopher T. Shenk, Counsel for AT&T Inc., to Rosemary McEnery, Chief, Market Disputes Resolution Division (dated Aug. 25, 2017) (Joint Letter).

² Joint Letter at 1-2.

that require a complaint, answer, and reply to include “proposed findings of fact” and “conclusions of law.”³ This waiver does *not* include the portions of rules 1.721(a)(6), 1.724(c), and 1.726(c) that require a complaint, answer, and reply to include “legal analysis relevant to the claims and arguments” set forth in the pleadings, as we find that such analysis enhances the Commission’s understanding of the legal bases for claims and defenses.⁴

We also grant the parties’ request to waive the portion of rule 1.726(a) that limits the complainant to addressing, in its reply, only the “specific factual allegations and legal arguments made by the defendant *in support of its affirmative defenses*.”⁵ Instead, Level 3 must file a reply addressing any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. We find that waiving this provision encourages joinder of the issues by the parties and results in a more complete record. Finally, given the limited nature of this dispute and the parties’ agreement to forego discovery, we grant the parties’ requested waiver of rules 1.721(a)(10), 1.724(f), and 1.726(d), governing the submission of information designations, and rule 1.729, governing the management of discovery.⁶

Schedule for Further Proceedings

We establish the following schedule for the submission of pleadings in this case consistent with the Joint Letter:

- Answer due 25 days from service of Complaint;
- Reply due 15 days from service of Answer;
- Surreply due 15 days from service of Reply

In adopting this schedule, we grant the parties’ request for leave to file a surreply and for waiver of the filing deadlines in rules 1.724(a) and 1.726(a), as we find that these actions will help to develop a more complete record in this case.⁷ We retain discretion to modify this schedule and to require additional written submissions as appropriate to meet the needs of this case.⁸

³ 47 CFR §§ 1.721(a)(6), 1.724(c), 1.726(c).

⁴ *Id.* In addition, this ruling does not relieve the parties of their obligation to support legal arguments by citation to “appropriate judicial, Commission, or statutory authority” and to distinguish “[o]pposing authorities.” See 47 CFR § 1.720(d),(e).

⁵ Joint Letter at 1-2. See 47 C.F.R. § 1.726(a) (emphasis added).

⁶ Joint Letter at 1. See 47 CFR §§ 1.721(a)(10), 1.724(7), 1.726(d); and 1.729.

⁷ Joint Letter at 2. See 47 CFR §§ 1.724(a), 1.726(a).

⁸ We note that counsel for the parties have indicated that there are no disputed issues of fact in this case. If disputed issues of fact should arise, the parties may be required to file a Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, in accordance with Commission rules 1.732(f),(g) and 1.733(b)(1)(v). See 47 CFR §§ 1.732(f),(g), 1.733(b)(1)(v).

Protective Order

The Joint Letter requests that the Commission enter the attached Protective Order, which establishes procedures governing the use and disclosure of proprietary information for purposes of this proceeding. The Joint letter states that the parties' proposed Protective Order is based largely upon the Model Protective Order approved by the Commission in *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Red 24816, Appendix C (1998) and is "of the type that the Bureau has entered in previous formal complaint proceedings."⁹ We find that granting the parties' request will serve the public interest. Accordingly, we hereby adopt the proposed Protective Order, which is appended to this letter ruling.

This letter ruling is issued pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, Sections 0.457(d), 0.459, 0.461, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 0.457(d), 0.459, 0.461, and 1.720-1.736, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311.

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Lisa Saks, Assistant Division Chief,
Market Disputes Resolution Division
Enforcement Bureau

⁹ Joint Letter at 2. We note that the Commission staff suggested certain minor changes to the proposed Protective Order, as originally filed. The parties agreed to those changes, which are included in the version of the proposed Protective Order that the parties submitted with the Joint Letter.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

LEVEL 3 COMMUNICATIONS, LLC,

Complainant,

v.

AT&T INC., BELLSOUTH
TELECOMMUNICATIONS, LLC,
NEVADA BELL TELEPHONE COMPANY,
PACIFIC BELL TELEPHONE COMPANY,
SOUTHWESTERN BELL TELEPHONE,
L.P., ILLINOIS BELL TELEPHONE
COMPANY, INDIANA BELL TELEPHONE
COMPANY, MICHIGAN BELL
TELEPHONE COMPANY, OHIO BELL
TELEPHONE COMPANY, AND
WISCONSIN BELL TELEPHONE
COMPANY,

Defendants.

File No. EB-17-MD-003
Proceeding No. 17-227

PROTECTIVE ORDER

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. “Confidential Information” means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information; and (iii) information that the Commission has allowed to be examined off-site and that otherwise complies with the requirements of this paragraph. Confidential Information includes additional copies of and information derived from Confidential Information.

d. Declaration. “Declaration” means the Attachment to this Protective Order.

e. Reviewing Party. “Reviewing Party” means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding. The definition of Reviewing Party does not include the Commission or Commission staff.

f. Submitting Party. “Submitting Party” means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party, may designate information as “Confidential Information” consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 & 0.461, determine that all or part of the information claimed as “Confidential Information” is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE.” Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information. The redacted version of a pleading shall bear on the front page the legend “PUBLIC VERSION” and shall clearly indicate where confidential material has been redacted from an individual page. If any pages are removed in their entirety to prevent disclosure of confidential information, the Submitting Party shall insert a placeholder that (a) identifies each omitted document by its page, exhibit, or appendix number, (b) includes a descriptive title for the omitted document, and (c) contains the words “CONFIDENTIAL MATERIALS OMITTED” below the descriptive title. The confidential version of a pleading shall identify any Confidential Information by including the legend “BEGIN CONFIDENTIAL” and “END CONFIDENTIAL” at the beginning and end of any such information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Protective Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of Paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Protective Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; or

c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper, but the term Authorized Representative shall not include the Commission or Commission staff.

8. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized

Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

9. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

10. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review) unless otherwise ordered by the Commission or a court of competent jurisdiction, shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Protective Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

11. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Protective Order must be clearly marked:

"Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c of this paragraph is not removed.

12. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms,

it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

13. Termination of Proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made. Authorized Representatives shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party and other attorney work product. Any Confidential Information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have not been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with Paragraphs 10 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Protective Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

14. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

15. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

16. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

17. Authority. This Protective Order is issued pursuant to Sections 4(i), 4(j) and 208 of the Communications Act as amended, 47 U.S.C. §§ 154(i), 154(j) and 208, sections 0.457(d),

0.459, 0.461, and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 0.457(d), 0.459, 0.461, and 1.720-1.736, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311.

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LEVEL 3 COMMUNICATIONS, LLC,

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COMPANY, MICHIGAN BELL
TELEPHONE COMPANY, OHIO BELL
TELEPHONE COMPANY, AND
WISCONSIN BELL TELEPHONE
COMPANY,

Defendants.

File No. EB-17-MD-003
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DECLARATION

I, _____, hereby declare under penalty of perjury that I have read the Protective Order in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

Signature: _____

Name: _____

Representing: _____

Title: _____

Employer: _____

Address: _____

Tel: _____

Date: _____